Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

KENT A. MCNEIL,

Petitioner,

vs.

HENRY GRAYSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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57pp

QUESTIONS PRESENTED

I.

DID THE STATE AND FEDERAL COURTS ERR BY DEFAULTING PETITIONER'S WRIT OF HABEAS CORPUS WHEN PROCEDURAL DEFAULT DOES NOT BAR REVIEW WHEN THE STATE PROCEDURAL RULE WAS NOT FIRMLY ESTABLISHED AND REGULARLY FOLLOWED AT THE TIME PETITIONER SHOULD HAVE FILED A DIRECT APPEAL?

Petitioner contends the answer is "YES".

State and Federal Courts answer "NO".

II.

DID THE STATE COURTS ERR WHEN DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT WHERE COUNSEL WAS FORCED ON HIM AFTER HE HAD EXPRESSLY WAIVED COUNSEL AND WAS ALLOWED TO PROCEED IN PROPRIA PERSONA, AND THIS VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO DEFEND HIMSELF IN PROPRIA PERSONA?

Petitioner contends the answer is "YES".

State and Federal Courts, "DID NOT ANSWER".

III.

DID THE STATE COURTS ERR WHEN DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT BECAUSE, IF THE PETITIONER WAS NEVER INFORMED OF HIS RIGHT TO DEFEND IN PROPRIA PERSONA, HOW CAN IT BE PRESUMED THAT HE

QUESTIONS PRESENTED – Continued

WAIVED THIS IMPORTANT CONSTITUTIONAL RIGHT?

Petitioner contends that the answer is "YES".

State and Federal Courts, "DID NOT ANSWER".

IV.

DID THE STATE COURTS ERR WHEN DENYING PETITIONER'S MOTION FROM RELIEF FROM JUDGMENT WHERE THE TRIAL COURT FOUND THE PLEA PROCEEDINGS WERE NOT DEFECTIVE AFTER THE TRIAL COURT HAD FAILED TO ADVISE PETITIONER THAT BY PLEADING GUILTY HE WAIVED HIS CONSTITUTIONAL RIGHT TO CONFRONT AND QUESTION HIS ACCUSERS IN OPEN COURT?

Petitioner contends that the answer is "YES".

State and Federal Courts, "DID NOT ANSWER".

V.

DID THE STATE COURTS ERR WHEN DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT WHERE THE TRIAL COURT FOUND THE PETITIONER WAS NOT DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

Petitioner contends that the answer is "YES".

State and Federal Courts, "DID NOT ANSWER".

QUESTIONS PRESENTED – Continued

VI.

DID THE STATE COURTS ERR WHEN DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT WHERE THE TRIAL COURT FOUND THE PETITIONER WAS NOT ENTITLED TO POST-CONVICTION RELIEF UNDER MCR 6.508?

Petitioner contends that the answer is "YES".

State and Federal Courts, "DID NOT ANSWER".

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

FEDERAL COURTS:

The Order of the United States court of appeals, dismissing petitioner's writ of habeas corpus, appears at Appendix E to the petition and is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is unpublished.

STATE COURTS:

The slip Opinion of the Michigan Supreme Court, dismissing petitioner's writ of habeas corpus appears at Appendix C to the petition and is unpublished.

The slip opinion of the Michigan Court of Appeals, dismissing petitioner's writ of habeas corpus appears at Appendix B to the petition and is unpublished.

The opinion of the Michigan Circuit Court, dismissing petitioner's writ of habeas corpus appears at Appendix A to the petition and is unpublished.

JURISDICTION

FEDERAL COURTS:

The date on which the United States Court of Appeals decided my case was December 1, 1998.

No petition for rehearing was timely filed in my case.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATE COURTS:

The date on which the Michigan Supreme Court decided my case was April 25, 1997. A copy of that slip opinion appears at Appendix C.

No petition for rehearing was timely filed in my case.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

I. DISMISSING PETITIONER'S WRIT OF HABEAS CORPUS ON GROUNDS OF PROCEDURAL DEFAULT, BY APPLYING COURT RULE (MCR 6.508), A REQUIREMENT THAT WAS NOT IN EFFECT AT THE TIME PETITIONER FILED HIS APPEAL OF RIGHT, VIOLATED THE EX POST FACTO PROTECTION OF THE UNITED STATES CONSTITUTION.

II. FORCING COUNSEL ON PETITIONER AFTER HE EXPRESSLY WAIVED COUNSEL AND WAS ALLOWED TO PROCEED IN PROPRIA PERSONA,

VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO DEFEND HIMSELF IN PROPRIA PERSONA.

III. PETITIONER WAS NEVER INFORMED OF HIS RIGHT TO DEFEND IN PROPRIA PERSONA, THEREFORE IT CAN NOT NOW BE PRESUMED THAT HE WAIVED THIS VERY IMPORTANT CONSTITUTIONALLY PROTECTED RIGHT.

IV. PETITIONER WAS DENIED HIS CONSTITUTIONALLY PROTECTED RIGHT TO CONFRONT AND QUESTION HIS ACCUSERS IN OPEN COURT.

V. PETITIONER WAS DENIED HIS CONSTITUTIONALLY PROTECTED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

VI. PETITIONER WAS DENIED HIS CONSTITUTIONALLY PROTECTED RIGHT TO EQUAL PROTECTION UNDER THE LAW, WHEN THE STATE TRIAL COURTS FOUND THE PETITIONER WAS NOT ENTITLED TO POST-CONVICTION RELIEF UNDER MCR 6.508.

STATEMENT OF THE CASE

Petitioner Kent A. McNeil, [hereinafter Petitioner] prisoner number A-192263, is currently confined with the Michigan Department of Corrections, (hereinafter MDOC). Petitioner is currently on parole, located at: 703 North Bridge Street, Bellaire, MI 49615. On July 27, 1986, Petitioner was arrested on a four (4) count felony warrant, file number 86-421-4-FC, charging him with: Count I, Kidnapping; Count II, Assault with intent to do great bodily harm less than the crime of murder; Count III,

Extortion; Count IV; Robbery armed. (It should be noted, that the four charges were the result of a single transaction, occurrence, victim, and all occurred on the same date, and time.) On August 14, 1986, the court appointed Counsel James N. Erhart to represent petitioner in the above entitled case. On October 12, 1986, petitioner pled guilty to count II, assault with intent to do great bodily harm less than the crime of murder, and count IV, robbery armed. In the early part of November 1986, petitioner wrote the judge in the case, Richard Pajtas informing him that he did not want Mr. Erhart to represent him any further, because Mr. Erhart was violating his Constitutionally protected rights. The Court wrote a letter on November 6, 1986 advising the petitioner that he did not have the right to choose attorneys. On March 12, 1987, Mr. Erhart finally removed himself from the case after petitioner requested a jury trial. On March 17, 1987, attorney Martin B. Breighner III was then appointed to represent the petitioner. On March 20, 1987, petitioner withdrew his plea of guilty because the prosecutor had backed out of plea agreement. On October 15, 1987, based on a motion from the petitioner, Judge Pajtas disqualified himself from the case. On October 20, 1987 the case was than assigned to Judge Lidel. On October 28, 1987, Judge Lidel removed himself from the case after threats from the prosecutor, John F. Salan, and the case was then assigned to Judge Nicholas J. Lambros. On October 29, 1987, petitioner's defense attorney removed himself from the case because he and petitioner could not come to an agreement regarding defense strategy. Petitioner desired to represent himself. On November 10, 1987, attorney Diane M. Smith was appointed to represent the petitioner,

against his vocal objections. On January 11, 1988, after sitting in a maximum security jail cell for almost two (2) years, petitioner reluctantly pled guilty to charges of kidnapping, MCL 750.349; MSA 28.581 and extortion MCL 750.213; MSA 28.410. On February 17, 1988, Judge Lambros sentenced the petitioner to a term of 13 to 20 years on each count to run concurrently, with 571 days jail credit for time served. At the plea and sentencing, petitioner instituted the following post-conviction proceedings and was only represented by counsel in the following: A. *People v. Kent A. McNeil,* Emmet County Circuit Court No. 86-421-4-FC; Motion for Correction of Pre-Sentence Investigation Report; Represented by Susan J. Smith, and was GRANTED on August 3, 1989. B. *People v. Kent A. McNeil,* Michigan Court of Appeals No. 112923; appeal of right; Represented by Susan J. Smith, conviction affirmed December 12, 1989. Petitioner proceeded in propria persona in the following post-conviction actions: A. *People v. Kent A. McNeil,* Michigan Supreme Court No. 88051; application for leave to appeal denied in a slip opinion on June 26, 1990. B. *People v. Kent A. McNeil,* Emmet County Circuit Court No. 86-421-4-FC Motion for resentencing based on a corrected Pre-Sentence Investigation Report April 16, 1991. C. *People v. Kent A. McNeil,* Michigan Court of Appeals No. 116849; Application for Leave to Appeal; Conviction and sentence was affirmed on August 13, 1992. D. *People v. Kent A. McNeil,* Michigan Supreme Court No. 88509; Application for Leave to Appeal, denied June 3, 1992.

On July 25, 1995, Petitioner requested to withdraw his plea of guilty and proceed to trial in his Motion for

Relief from Judgment and Memorandum of law in Support. The basis for that relief was as follows: Petitioner was denied his constitutionally protected right to represent himself. *Faretta v. California*, 422 U.S. 806, 9 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). The Trial Court Judge, although granting petitioner the right to proceed in propria persona on October 29, 1987 (See Motion Transcript [Withdraw of Counsel] (10/29/1987, page 12), allowed without petitioner's consent, standby counsel to take over the entire case.

The failure of the State Court to advise petitioner at the plea proceedings that he was waiving his right to defend in propria persona renders the guilty plea constitutionally defective.

The Trial Court failed to advise the petitioner that he was waiving his right to confront the witnesses against him, contrary to *Boykin v. Alabama*, 395 U.S. 238 (1969), *People v. Jaworski*, 387 Mich. 21 (1972), *Guilty Plea Cases*, 395 Mich. 96, 120-121 (1975), and MCR 6.610.

Petitioner was denied the effective assistance of counsel where defense counsel failed to object to the defects in the plea proceedings. Under these circumstances, the level of representation fell below that which would satisfy the Sixth and Fourteenth Amendments' right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2054, 80 L.Ed.2d 674 (1984).

Petitioner has pursued post-conviction remedies through appellate counsel as well as in propria persona. However, the precise grounds for relief alleged – forcing

standby counsel on petitioner after he was allowed to represent himself in propria persona; failure to advise petitioner at the guilty plea proceedings that he was waiving his constitutionally protected right to proceed in propria persona; failure to advise petitioner of his right to confront the witnesses against him; denial of the effective assistance of counsel have NEVER been raised or considered by the Trial or Appellate Courts until now, Petitioner contends under MCR 6.508(D)(3)(a), there is good cause for not having raised these issues in a previous appeal. Specifically, petitioner was denied the effective assistance of appellate counsel, who failed to properly raise and preserve the within issues for review on his appeal of right in the State Courts of Michigan. Ineffective assistance of counsel constitutes good cause for a delayed appeal. See *People v. Wolfe*, 156 Mich. App. 225 (1986); *People v. Pauli*, 138 Mich. App. 530 (1984), petitioner contends under MCR 6.508(D)(3)(b)(ii), that petitioner suffered actual prejudice from the errors set forth herein, under this issue relying on *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) and *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), as precedent, obtaining a reversal for violation of such a right does not require a showing of prejudice. See *McKaskle v. Wiggins*, 465 U.S. 168, 177-178 fn. 8, 104 S.Ct. 944, 951, fn. 8, 79 L.Ed.2d 122 (1984). The confrontational issue is also at the core of fundamental constitutional rights scrupulously observed by both State and Federal courts. The failure to assure that petitioner's rights were protected, on the record before the court, is effective assistance of counsel, and for counsel's error in not ensuring that the petitioner rights were specifically observed,

this resulted in petitioner entering into an involuntary plea. An involuntary plea cannot be sustained. Petitioner contends he was entitled to an evidentiary hearing in the State Circuit Court on the issue of ineffective assistance of counsel. *People v. Ginther,* 390 Mich. 436 (1973). On August 22, 1995, Judge Johnson issued an order to the special prosecutor, Mary Kurr, to file a response and briefed within 21 days from the date of the order, on September 6, 1995, Ms. Kurr filed an answer to petitioner's motion for relief from judgment. Ms. Kurr omitted in each of her quotes from the transcripts concerning the Petitioner's request to represent himself, all requests made by the petitioner on the record at trial court. On October 20, 1995, Emmet County Circuit Court Judge Johnson, issued a written opinion and order, dismissing petitioner's motion for relief from judgment. The trial court erred in relying on *People v. Reed,* 449 Mich. 375 (1995), when denying petitioner's motion for relief from judgment. The Supreme Court did not preclude all post conviction relief, no, it, instead defined the standard the petitioner had to meet to show "cause" so that he or she may prevail on review. *Id.* at 385. Petitioner's conviction constitutes a "miscarriage of jsutice" as shown in the arguments presented, and thus, a sufficient showing to satisfy the *Reed* standard. Contrary to the trial court's holding, these proceedings should not come to an end. Petitioner contends that:

A. Procedural default does not bar Habeas review when the State procedural rule MCR 6.500 was NOT firmly established and regularly followed at the time petitioner should have filed a direct appeal.

B. Forcing counsel on petitioner after he expressly waived and was allowed to proceed in propria persona, Persona, violated his constitutionally protected right to defend himself in propria persona.

C. When petitioner is never informed of his right to defend in propria persona, he can not be presumed to have waived this very important constitutional right and, therefore, the guilty plea proceedings must be considered constitutionally defective.

D. The plea proceeding was defective due to the trial court's failure to advise petitioner that by pleading Guilty he waived his constitutional right to CONFRONT and QUESTION his accusers in open court.

E. Petitioner was denied his constitutionally guaranteed right to the effective assistance of counsel. Where defense counsel failed to object to the defects in the plea proceedings.

On July 12, 1996, Petitioner's application for leave to appeal was denied by the Michigan Court of Appeals based upon a slip opinion which stated: "Failed to meet the requirements under MCR 6.508(D)." On April 25, 1997, the Michigan Supreme Court denied petitioner's application for leave to appeal in a slip opinion stating: "Failed to meet the requirements under MCR 6.508(D)." On June 4, 1997, petitioner filed his writ of habeas corpus in the United States District Court, Western District of Michigan, Southern Division. On April 28, 1998, the U.S. Magistrate Judge Hon. Doyle A. Rowland issued his

Report and Recommendation, recommending that petitioner's habeas corpus be dismissed under the "procedural default doctrine." On June 9, 1998, the Hon. David W. McKeague (District Court Judge), denied the petitioner's habeas corpus.

On September 21, 1998, the Hon. David W. McKeague, ensured the dismissal of petitioner's habeas corpus by issuing an: "Order Denying Certificate of Appealability."

On December 1, 1998, the Hon. Chief Judge Martin, issued an order from the United States Court of Appeals for the Sixth Circuit stating in pertinent part: "Upon review, the court denies the application for certificate of appealability as to all issues."

It should be noted that petitioner never was afforded that opportunity to present his arguments to the Court of Appeals before it was denied.

Petitioner respectfully now files this timely petition for Writ of Habeas Corpus in the United States Supreme Court, and invokes the jurisdiction of this Honorable Court under both 28 U.S.C. sec. 1257(a) and 28 U.S.C. sec. 1254(1).

REASONS FOR GRANTING THE PETITION

ARGUMENT I

PROCEDURAL DEFAULT DOES NOT BAR HABEAS REVIEW WHEN THE STATE PROCEDURAL RULE WAS NOT FIRMLY ESTABLISHED AND REGULARLY FOLLOWED AT THE TIME PETITIONER SHOULD HAVE FILED A DIRECT APPEAL.

Ordinarily, the federal court is limited to considering only those habeas issues which petitioner has presented to the state appellate courts. 28 U.S.C. sec. 2254(c) (1988) and 28 U.S.C. sec. 2253(4); *Anderson v. Harless*, 459 U.S. 46 (1982). A State defendant fairly presents his constitutional claims to the state court if he a) relies on pertinent federal cases employing constitutional analysis; b) relies on state court cases employing constitutional analysis in like fact situations; c) asserts the claim in terms so particular as to call to mind a specific right protected by the Constitution; or d) alleges a pattern of facts well within the mainstream of constitutional litigation. *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987) (quoting *Dave v. Attorney General of New York*, 696 F.2d 186, 194 (2nd Cir. 1982) (en banc), cert. denied, 464 U.S. 1048 (1984)).

The federal court will not review a question of law decided by a state court if the state decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977); *Coleman v. Thompson*, 111 S.Ct. 2546, 2553-54 (1991). This rule applies whether the state law ground is SUBSTANTIVE or PROCEDURAL. *Coleman*, supra, 111 S.Ct. at 2554. When a claim is not presented to the state according to the proper procedure,

the claim is usually lost, or "Procedurally defaulted." *Coleman,* supra, 111 S.Ct. at 2567.

The claims which are the subject of petitioner's federal habeas proceeding were presented to the Michigan courts July 25, 1995, on post-conviction relief in a Motion for Relief from Judgment.[1]

Michigan courts rejected this attempt to seek post-conviction relief, citing failure to comply with Michigan Court Rule 6.508(D). The state court rules were amended effective October 1, 1989, to restrict the avenue for post-conviction relief which existed at the time of petitioner's conviction, (petitioner's conviction date is January 11, 1988.) MCR 6.508(D)(3) now precludes any review of nonjurisdictional grounds for relief absent a showing of CAUSE and PREJUDICE. Thus, the rule generally requires a defendant to bring all his claims in his first appeal of right, or he risks losing any review of these issues. By applying MCR 6.508(D) to this petitioner, the Michigan courts are assuming in error that the petitioner's first appeal should have met the standards of a rule which did not yet exist. Nevertheless, Michigan has retroactively applied the rule to petitioner's case and found that the present claims are procedurally defaulted

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[1] Petitioner sought leave to appeal the trial court's denial of the Motion for Relief from Judgment before the Michigan Court of Appeals. The Court of Appeals denied the timely leave to appeal stating in pertinent part: " . . . due to defendant failure to establish entitlement to the relief requested. Defendant did not establish good cause for the failure to raise the issues raised herein previously. MCR 6.508(D)(3)(a)." The Michigan Supreme Court denied review on the same grounds.

contrary to the protection of the "EX POST FACTO" protection in the Constitution.

Absent a showing of cause and prejudice, a habeas petitioner generally cannot raise issues in a sec. 2254 petition which the petitioner failed to raise in state court, if he is required to do so by state law. The failure can be an adequate and independent ground to sustain the conviction and bar review of federal constitutional claims. See, *Coleman v. Thompson*, 111 S.Ct. 2546, 2553-55 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977). However, the Supreme Court has held unanimously that a new procedural rule applied retroactively by a state supreme court is not an adequate and independent state ground which would bar federal consideration of a claim. *Ford v. Georgia*, 111 S.Ct. 850 (1991). In *Ford*, the United States Supreme Court overlooked Georgia's determination that a constitutional issue was procedurally barred and reached the merits of the claim, declaring that "[n]ovelty in procedural requirements cannot be permitted to thwart the review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* (quoting *NAACP v. Alabama ex Rel. Patterson*, 357 U.S. 449, 457-458 (1958)). The Court emphasized that "only a 'firmly established and regularly followed state practice' may be interposed by a state to prevent subsequent review by this Court of a federal constitutional claim." *Id.* (quoting *James v. Kentucky*, 466 U.S. 341, 348-351, 104 S.Ct. 1830, 1835-37 (1984)). A timely, direct appeal of right was the place for petitioner to raise most, if not all of his claims. Some of them may have been appropriate for a

delayed motion for a new trial or other procedural vehicles which existed until the new Michigan court rule. See, *People v. Barrows,* 358 Mich. 267, 273, N.W.2d 347, 350 (1959) (allowing motion to set aside guilty plea ten years after entry); *People v. Pauli,* 138 Mich. App. 530, 535, 361 N.W.2d 359, 362 (1984) (allowing review of trial court's denial of defendant's motion for new trial, which was brought four (4) years after conviction); *People v. Curry,* 142 Mich. App. 724, 371 N.W.2d 854 (1985) (granting post-conviction relief on appeal from denial of motion for new trial brought fourteen (14) years after conviction.) However, as recently explained by our circuit, the argument that review of the federal constitutional claims barred under these circumstances is based upon a misunderstanding of *Procedural Default Analysis, Warner v. United States,* 975 F.2d 1207, 1213 (6th Cir. 1992), cert. denied, 113 S.Ct. 1314 (1993). There was NO firmly established state procedural rule, like MCR 6.500 et seq., at the time of this petitioner's trial or the time of his appeal of right would have been timely. Petitioner was not required at that time to raise all the claims in his direct appeal or forgo them forever. Thus, the state procedural default is based on a retroactive application of a new rule and cannot serve as an adequate and independent ground.

This Petitioner's case is similar to that of *Terrell v. Morris,* 493 U.S. 1, 110 S.Ct. 4 (1989), adopting the analysis later reiterated in *Warner.* Terrell, an Ohio prisoner, sought state post-conviction review of his claim of ineffective assistance of counsel. At the time of Terrell's appeal of right, Ohio had permitted defendants to raise ineffective assistance of counsel claims in post-conviction challenges such as Terrell's. However, the Ohio courts

relied upon a rule decided after Terrell's first appeal of right to find that Terrell's claim should have been raised on direct appeal. The Ohio court, thus, considered the claim Procedurally Defaulted. Terrell subsequently petitioned for federal habeas corpus relief. On remand from the Supreme Court, the Sixth Circuit held that "We believe that a criminal procedural rule that constitutes a 'clear break' with the past practice, as the [Ohio rule] does, should not be applied retroactively to habeas corpus proceedings." *Terrell v. Morris*, 911 F.2d 734 (Table), 1990 WL 120960, cert. denied, 498 U.S. 1000 (1990).

Other circuits are all in agreement and look beyond a state court's finding of procedural default where the state procedural rule was firmly established at the time of appeal of right. See *Wilcher v. Hargett*, 978 F.2d 872, 878-79 (5th Cir. 1992), cert. denied, 114 S.Ct. 96 (1993) (federal habeas review not precluded when petitioner's direct appeal decided when state supreme court did not strictly or regularly apply procedural rule barring post conviction appeals), *Lilly v. Gilmore*, 988 F.2d 783, 785 (7th Cir.), cert. denied, 114 S.Ct. 154 (1993); *Easter v. Endell*, 37 F.3rd 1343, 1345-46 (8th Cir. 1994); *Harmon v. Ryan*, 959 F.2d 1457, 1461-62 (9th Cir. 1992); *Gutierrez v. Moriarty*, 922 F.2d 1464, 1469 (10th Cir.), cert. denied, 112 S.Ct. 140 (1991); *Hansborough v. Latta*, 11 F.3rd 143, 146 (11th Cir.), cert. denied, 115 S.Ct. 291 (1994).

ARGUMENT II

THE TRIAL COURT ERRED WHEN DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT WHERE COUNSEL WAS FORCED ON HIM AFTER HE HAD EXPRESSLY WAIVED COUNSEL AND WAS ALLOWED TO PROCEED IN PROPRIA PERSONA, AND THIS VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO DEFEND HIMSELF IN PROPRIA PERSONA.

The primary question in this argument is whether the State trial court violated petitioner's right to self representation. The United States Supreme Court found the right to defend in PROPRIA PERSONA to be an integral part of the Sixth Amendment to the United States Constitution. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).[2] In *Faretta*, supra, the Court recognized as "undeniable" that in most criminal cases, defendants could better defend with counsel's guidance than by their own unskilled efforts. But it said:

> **"Personal liberties are not rooted in the law of averages. The right to defend is personal. The**

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[2] An accused's right whether to defend in person or to be defended by counsel is guaranteed by the Michigan Constitution and statute:

> "A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney." Mich Const. 1963, art. 1, sec. 13.
>
> "On the trial of every indictment or other accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have the right to produce witnesses and proofs in his favor, and meet the witnesses who are against him face to face." MCL 763.1; MSA 28.854.

> **defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." 422 U.S. at 843.**

Finding that the guarantee of assistance of counsel was never intended to override a defendant's right to dispense with such assistance,[3] the Court explained:

> **"The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the life blood of the law.' " (Citations omitted) 422 U.S. at 834.**

To compel the acceptance of unwanted counsel would, the *Faretta* Court concluded, violate cherished American concepts for the individual and the value of free choice. 422 U.S. at 833-34.

Self-representation is an absolute right which may be asserted by any competent defendant for any reason,

---

[3] *Faretta*, 422 U.S. at 820, fn. 15, noted that the right to proceed pro per does not arise mechanically from a defendant's power to waive the right to the assistance of counsel, the right must be independently found in the structure and history of the constitutional text. See *United States v. Plattner*, 330 F.2d 271, 276 (CA 2, 1964) ("the right to counsel and the right to defend pro se in criminal cases form a single, inseparable bundle of rights, two fases [sic] of the same coin.")

stated or unstated.[4] The defendant's lack of legal skills, the quality of his appointed or retained counsel, and the seeming folly of his choice cannot justify deprivation of this right. See *e.g. Faretta,* 422 U.S. at 835-836. See also *People v. Holcomb,* 395 Mich. 329 (1975).[5]

The question that now arises in this case is no different than the question decided by the United States Supreme Court in *Faretta*:

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[4] The Supreme Court in *Faretta* noted that Michigan is one state that accords a defendant the right to represent himself in any criminal case. *Faretta,* 422 U.S. at 813 fn. 9, citing *People v. Haddad,* 306 Mich. 566, 560 (1943), where the Court stated:

> "The defendant had the right to appear and defend himself against the accusation, in propria persona, and voluntarily pursued that course." (Emphasis in original.)

[5] In *Holcomb,* 395 Mich at 336 fn. 7, the Michigan Supreme Court gave *Faretta* full retroactivity, saying:

> "The right to representation at trial, whether by counsel or by the defendant himself, affects the truth and accuracy of the guilt determination process."
>
> "To deny retroactive effect to the right to proceed pro se on the ground that the right to counsel at trial enhanced the reliability of the fact-finding process while the right to proceed pro se inhibits or lessens the probability that the defendant's case will be adequately presented would be to reject the premise of *Faretta,* supra, fn. 2."
>
> "The Sixth Amendment terms, the right to proceed pro per is not qualitatively different from the right to counsel and accordingly, unless and until the United States Supreme Court limits the application of that right, we will accord it full retroactive effect."

> "Whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he INSISTS THAT HE WANTS TO CONDUCT HIS OWN DEFENSE." *Faretta*, 422 U.S. at 807 (emphasis added).

The *Faretta* Court answered this question:

> **"The language and spirit of the Sixth Amendment contemplates that counsel, like other defense tools guaranteed by the amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the amendment. In such a case, counsel is not an assistant, but a master; the right to make a defense is stripped of the personal character upon which the Amendment insists."** *Faretta*, 422 U.S. at 820 (footnote omitted.)

The waiver of counsel was affirmative, clear, and unequivocal, as evidenced by the record in this case.[6] No

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[6] Although the trial judge in this case did not specifically discuss with petitioner the dangers of self-representation as outlined in *Faretta*, there need be no express examination on the record to ensure that the petitioner's choice is his own. Petitioner's understanding is sufficient, *Stano v. Dugger*, 484 F.2d 1286, 1288 (CA 11, 1988), so long as the record contains facts indicating that the defendant recognized he was relinquishing his right to counsel. *Id.* See *Dorman v. Wainwright*, 798 F.2d 1358, 1367 (CA 11, 1986), cert. den., 480 U.S. 951, 107 S.Ct. 1616, 94 L.Ed.2d 801 (1987) (failure to hold formal hearing on waiver of counsel was not sufficient reason to deny pro se

word from the petitioner's mouth or pen ever retracted this demand upon the court and the subsequent allowance to proceed in propria persona. Moreover, the waiver was understandingly, knowingly and intelligently made by a person the judge said was: "bright". See Sentencing Transcript, page 17, Para. 2.

This waiver of counsel and the assertion of the right to proceed in propria persona was not limited to the pretrial stage. If petitioner wanted to represent himself at the pretrial stage ONLY, he would not have waived the assistance of counsel in the manner he did. The waiver of counsel and the request to proceed in propria persona was "general", it specifically was not "conditional", i.e., limited to the pretrial stage ONLY. Petitioner unequivocally stated that he was going to act as his own counsel, and thus representing himself throughout all proceedings.

Petitioner was at the pretrial stage of the proceedings. His assertion of the right to proceed in PROPRIA PERSONA was for that proceeding and subsequent proceedings, including trial. Petitioner did not state he wished to proceed in PROPRIA PERSONA for the pretrial stage ONLY, or any other SINGLE proceeding leading up to the time of trial. The assertion and waiver of counsel was clearly "UNCONDITIONAL."

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request, where record clearly indicated defendant's knowledge of the risks). Petitioner's request directed to the trial court clearly shows he understood what he was doing and that he had knowledge of the risks associated with the waiver of counsel and proceeding in PRO SE.

Indeed, when the Court in *Faretta*, supra, held the Sixth Amendment prohibits a court from forcing counsel on a defendant who prefers to represent himself, its decision was predicated on the insight that "[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him", and "although [the accused] may conduct his defense to his detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " *Faretta*, 422 U.S. at 834 (citations omitted).

As stated earlier, the waiver was affirmative, clear, and unequivocal, as evidenced by the record in the trial court. No word from the petitioner's mouth or pen ever retracted this demand upon the trial court and the court's allowing petitioner to proceed in PROPRIA PERSONA. Nothing in the record indicates that petitioner ever abandoned by conduct or otherwise his initial request to represent himself.[7] After the right to self-representation

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[7] Petitioner had not taken any affirmative action which could be construed as abandonment of his request to defend PRO SE. His mere acquiescence in counsel's representation at each subsequent proceeding cannot prejudice his request after the fact. See *United States v. Lorick*, 753 F.2d 1295, 1299 (CA 4, 1985), cert. den., 471 U.S. 1107, 105 S.Ct. 2342, 85 L.Ed.2d 857 (1985) (apparent acquiescence could, in fairness, only be taken as concession of inability to act on asserted right). *Lorick* was more recently followed in *Hacker v. Herbert*, 825 F.Supp. 1143, 1149 (ND N.Y., 1993).

Furthermore, Petitioner was not required to continually renew his already asserted right to self-representation. The Court in *Burton v. Collins*, 937 F.2d 131, 133 fn. 3 (CA 5, 1991), stated: "Repetition of the request to represent oneself is not necessary under *Faretta* to effectively assert the right to self-

clearly attaches, as it did here, the petitioner ought not be found to have waived it until there is a dialogue between the judge and the petitioner showing a knowing, intelligent and voluntary waiver. Only through such a dialogue is a court able to determine if the petitioner has willingly, chosen the assistance of counsel, contrary to his express intentions, or if the unwanted counsel has been imposed upon him despite his wishes, as was done here.

This case is not subject to any "harmless" analysis, as such an analysis does not apply to the right of self-representation. When a petitioner's right to represent himself has been violated, he is entitled to a reversal even if he cannot show prejudice.

In its most recent pronouncement on the harmless error rule, the United States Supreme Court affirmed that the right to self-representation remains in the category of constitutional errors which are not subject to harmless error:

> "Since our decision in *Chapman* [*v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)], other cases have added to the category of constitutional errors which are not subject to harmless error the following: . . . the right to self-representation at trial . . . Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. 'Without these basic protections, a criminal trial cannot reliably serve its function

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representation. See *Brown*, 665 F.2d at 611; See also *Orazio v. Dugger*, 876 F.2d 1508, 1512 (CA 11, 1989)."

> as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (citations omitted.)

Specifically addressing the "prejudice" analysis, the United States Supreme Court in *Flanagan v. United States*, 465 U.S. 259, 267-268, 104 S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1984), stated:

> "[T]he asserted right to counsel of one's choice is like for example, the Sixth Amendment right to represent oneself. See *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). OBTAINING REVERSAL FOR VIOLATION OF SUCH A RIGHT DOES NOT REQUIRE A SHOWING OF PREJUDICE to the defense, since the right Reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the Proceeding. See *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8, 104 S.Ct. 944, 951, n. 8; 70 L.Ed.2d 122 (1984)." (Emphasis added.)

Accord, *Wilson v. Mintzes*, 761 F.2d 275, 286 (CA 6, 1985); *Johnstone v. Kelly*, 808 F.2d 214, 218 (CA 2, 1986), cert. den., 482 U.S. 928, 107 S.Ct. 3212, 96 L.Ed.2d 699 (1987); *Dorman v. Wainwright*, 798 F.2d 1358 (CA 11, 1985), cert. den., 480 U.S. 951, 107 S.Ct. 1616, ___ L.Ed.2d 801 (1987); *Hacker v. Herbert*, 825 F.Supp. 1143, 1153 (ND N.Y. 1993) (following *McKaskle v. Wiggins*, 465 U.S. 168, 177 fn. 8, 104 S.Ct. 944, 950 fn. 8, 79 L.Ed.2d 122 (1984), where Justice O'Conner stated that the denial of the right to self-representation is not amenable to harmless error analysis. "The right is either granted or denied; its deprivation cannot be harmless."

The right to self-representation having attached in this case, it exists until and unless waived. A court must proceed with care in this area and with as much certainty as possible, or it will invite the danger described by the court in *Faretta:*

> "To thrust counsel upon the accused, against his considered wish . . . violates the logic of the [Sixth] Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the Personal character upon which the Amendment insists . . . An unwanted counsel 'represents' the defendant only through a Tenuous and unacceptable legal fiction. Unless the accused has acquienced in such representation, the defense presented is not the defense guaranteed him by the constitution, for in a very real sense, it is not HIS defense." 422 U.S. at 820-821 (emphasis added.)

Consequently, when petitioner's right of self-representation attached, and he was allowed to defend on his own, and when counsel was thereafter forced upon him and completely took over the defense ship which led to conviction by plea, this violated petitioner's constitutional right of self-representation guaranteed by *Faretta.* To hold otherwise would severely and unnecessarily risk the loss of what has been established as a fundamental constitutional right through the unbridled judgment of a trial court. The guilty plea conviction obtained in this case must be reversed.

ARGUMENT III

THE STATE COURT ERRED WHEN DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT WHERE THE TRIAL COURT FOUND THE PLEA PROCEEDING WERE NOT DEFECTIVE AFTER THE TRIAL COURT HAD FAILED TO ADVISE PETITIONER THAT BY PLEADING GUILTY HE WAIVED HIS CONSTITUTIONAL RIGHT TO CONFRONT AND QUESTION HIS ACCUSERS IN OPEN COURT.

In *Boykin v. Alabama*, 395 U.S. 238 (1969), the United States Supreme Court held that a defendant must be advised that he is waiving three important constitutional rights, on the record, before the plea can be voluntary and knowing:

> **"Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of These important federal rights from a silent record."** ***Id.*** **at 243 (citations and footnotes omitted.)**

Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. *Brady v. United States*, 397 U.S. 742, 748 (1970). The waiver "must be an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Consequently, the *Zerbst* standard has been applied

repeatedly by the United States Supreme Court whenever important and fundamental constitutional rights are the object of a waiver. Although the Court in *Boykin* did not explicitly require the states to adopt the *Zerbst* standard, there is no doubt but that *Zerbst* applies to Michigan courts. See *People v. McKinley,* 383 Mich. 529 (1970).

The standard which requires that the Court personally inform the defendant of his rights and that defendant intentionally, knowingly and voluntarily waive those rights was explicitly adopted by the Michigan Supreme Court in *People v. Jaworski,* 387 Mich. 21 (1972), decided subsequent to *Boykin.* In *Jaworski,* the Court considered the extent to which a defendant had to be informed of his rights:

> **"[I]n our opinion both Justice Douglas' [author of *Boykin*] language and his logic requires that the defendant must be informed of these rights, for without knowledge he cannot understandingly waive those rights." *Id.* at 28-29.**

Not only must a defendant be informed of these rights, but "the record must reflect that the defendant has been informed of each and all of the three constitutional rights he waives on pleading guilty." *Id.* at 30.

Even though the Michigan Supreme Court has modified the procedure required for a valid guilty plea, *Guilty Plea Cases,* 395 Mich. 96 (1975), the Court has not lessened the importance of *Boykin* and/or *Jaworski:*

> **"In *People v. Jaworski, supra,* decided after *Boykin v. Alabama, supra,* this Court held that a plea of guilty is constitutionally defective**

> **and the conviction must be set aside if the defendant is not advised of his rights to have a jury Trial, TO CONFRONT HIS ACCUSERS, and to remain silent."**
>
> **"A *Jaworski* defect cannot be corrected on a remand." *Guilty Plea Cases, supra* at 120-121 (emphasis added.)**

Petitioner contends that he was not advised he was waiving his right to confront his accusers, and that his plea is therefore not knowing and understanding. MCR 6.302(B)(3)(e) and (f) provides:

> **"(B) An understanding Plea. Speaking directly to the defendant, the court must advice the defendant and determine that the defendant understands:"**
>
> **"(3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:"**
>
> **"(e) to have the witnesses against the defendant appear at the trial;"**
>
> **"(f) to question the witnesses against the defendant[.]"**

Sub-paragraphs (e) and (f) together, convey to petitioner his constitutional right to confront the witnesses against him, "his accusers." The petitioner in this case was not advised of HIS right "to question the witnesses against" him and, instead, he was advised of the following:

> **THE COURT: You also have the right to have any person who would testify**

> **against You to have those persons appear in open court and so testify and be Subject to cross examination by your attorney, Diane Smith. Do you Understand that? PLEA TRANSCRIPT, p. 5.**

Advising petitioner that he waives the right to have the right to have his "attorney" cross-examine and question the witnesses against him does not convey to petitioner his PERSONAL right to CONFRONT his ACCUSERS. It is the petitioner who has the right to PERSONALLY question the witnesses against him, and not petitioner's attorney. As the United States Supreme Court said in *Faretta v. California*, 422 U.S. 806, 819 (1975):

> **"The Sixth Amendment does not provide merely that a defense shall be made for the accused; IT GRANTS TO THE ACCUSED PERSONALLY THE RIGHT to MAKE HIS DEFENSE. It is the accused not counsel who must be 'informed of the nature and cause of the accusation,' who must be CONFRONTED WITH THE WITNESSES AGAINST HIM,' and who must be accorded 'compulsory Process for obtaining witnesses in his favor.' " (Emphasis added.)**

The failure of a court to advise a defendant that he is waiving his right to "CONFRONT HIS ACCUSERS" was addressed in *People v. D'Argis*, 44 Mich. App. 186 (1972), and *People v. Purdy*, 46 Mich. App. 630 (1974). In each of these cases, reversal was required.

In both *D'Argus* and *Purdy*, the advise given by the judge was comparable. In essence, the defendants were

advised that their attorney could "QUESTION WITNESSES" for them. The Court's were concerned because there was no mention made of defendant's right to "examine adverse or complaining witnesses." *D'Argis, supra,* at 195. However, in this case, petitioner contends that he was not advised he was waiving his constitutional right to confront his accusers. This is not a case of an imprecise recital of a constitutionally guaranteed right. The advise given by the judge in this case concerning the right specified by the court rule, and guaranteed by the Constitution, is simply absent. The petitioner should not be expected to guess from the trial court's statements that he had the right to confront and question his accusers in open court.

Because the trial court failed to advise the petitioner of one of his fundamental rights, the plea proceedings were defective. As a result, the petitioner could not have made a knowing and intelligent waiver of a constitutional right. Such gross omission requires and demands reversal; otherwise, a defendant's constitutional rights are meaningless.

CONCLUSION

From the facts stated in all the within arguments, it can be stated with reasonable accuracy that this case represents a prime example where a petitioner will be denied fundamental rights if his relief requested is not granted. Surely, no fair minded person:

> **" . . . will contend that those who have been deprived of their liberty without due process**

of law ought nevertheless to languish in prison." *Fay v. Noia*, 372 U.S. 391 (1963).

Nor could anyone argue that the gates of our prisons should swing open for each prisoner who starts up the wheels of litigation. However, when society has grievously wronged those few who are ultimately successful, belated liberation is little enough compensation. To deny the petitioner in this case his requested relief would swing close the doors of justice in the face of the petitioner.

The safeguards of due process and equal protection of the laws summarized the history of freedom of English speaking people running back to the Magna Carta and reflected in the constitution of our people. *Malanski v. New York*, 324 U.S. 401 (1945). Just as it would be a violation of due process to send a person to prison following a conviction of a charge on which he was never tried, or convict him upon a charge that was never made, *People v. Owens*, 12 Mich. App. 469 (1968), so would it be a violation of due process to deny this petitioner his relief requested when there are so many apparent constitutional rights that have been violated in this case.

In conclusion, and with all the foregoing reasons and arguments, petitioner requests that this Court grant relief now requested, because the judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights. *Stemler v. Willis*, 415 F.2d 1365, 1370 (1969).

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APPENDIX A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF EMMET

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

File No: 86-421-4-FC

v

KENT A. MCNEIL,

Defendant.

OPINION and ORDER

Defendant has moved for post appeal relief. This motion is governed by subchapter 6.500 of the Michigan Court Rules.

On or about August 6, 1986, Defendant was arrested on a four count felony warrant. The charges against him were as follows:

Count I – Kidnapping

Count II – Assault with Intent to do Great Bodily Harm less than the crime of Murder

Count III – Extortion

Count IV – Armed Robbery

On January 11, 1988, Defendant pled guilty to the charges of kidnapping and extortion. Pursuant to a plea agreement, the remaining charges against Defendant were dismissed. On February 17, 1988, Judge Lambros sentenced Defendant on each conviction to serve a term of 13 to 20

years with the Michigan Department of Corrections, each sentence to run concurrently with the other.

Review of the Defendant's present motion and the record indicates that this is Defendant's seventh postconviction proceeding. Defendant was represented by at the trial court level by court appointed counsel, first James Erhart, then Martin Breighner, then Diane Smith. In three of his postconviction proceedings, Defendant had the assistance of appellate counsel, Susan J. Smith. She represented Defendant in his appeal of right to the Michigan Court of Appeals. His conviction was affirmed by the Court of Appeals on December 12, 1989.

Defendant has the burden of showing entitlement to the relief requested by him in this motion. MCR 6.508(D). The rule states, in pertinent part:

> "The court may not grant relief to the defendant if the motion . . . (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates (a) good cause for failure to raise such grounds on appeal or in the prior motion, and (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, 'actual prejudice' means that, . . . (ii) in a conviction entered on a plea of guilty, . . . the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand; (iii) in any case, the irregularity was so offensive to the maintenance to a sound judicial process that the conviction should not

> be allowed to stand regardless of its effect on the outcome of the case; . . . "
>
> MCR 6.508(D)

In the Supreme Court's most recent pronouncement concerning postconviction relief, the Court stated:

> "The specific purpose for creating the postconviction procedure was to provide finality of judgments affirmed after one full and fair appeal and to end repetitious motions for new trials . . . Postconviction relief is provided for the extraordinary case in which a conviction constitutes a miscarriage of justice . . . However, where the state has afforded a full and fair opportunity to reliably determine guilt and an appeal of right, assisted by constitutionally adequate counsel at public expense, all institutional and public interests support the conclusion that proceedings should come to an end unless the defendant's conviction constituted a miscarriage of justice."
>
> *People v. Reed, 449 Mich 375, 381-382 (1995)*

Nothing in this record suggests a miscarriage of justice. Defendant pled guilty freely and voluntarily, after he was properly advised of his constitutional right. There were numerous hearings conducted both before and after Defendant's plea, where he was afforded the opportunity to address the Court. Defendant never demanded that he be permitted to represent himself. The only discussion of self-representation came at the hearing on October 29, 1987, when attorney Breighner was allowed to withdraw as Defendant's attorney. When asked by Judge Lambros if he wished to represent himself, Defendant responded as follows:

> "The Defendant: Yes, your Honor, I would like to do that. And, I would also like to ask the Court – I know it would be a burden on the Court and I don't want to do that, but if I could have some kind of assistance in handling this case."
>
> (10/29/87 Hearing, p. 7)

After further discussion in an effort to clarify Defendant's request for assistance, the Court advised him as follows:

> "First of all, Mr. McNeil, we are going to replace – the Court is going to replace and appoint an attorney not necessarily to represent you, but talk to you. You may want to proceed on your own. There is some law here that the Court has to make some finding regarding whether or not the Court feels you should be able to proceed in a case of this magnitude to represent yourself even with an attorney sitting as an advisor. So what I would like to do first of all, is to appoint an attorney to talk with you, and you can confer with him. You may decide that you want him to represent you or you may not not. (sic) You may want to proceed as you want to on your own with a person on this advisory capacity . . . I'll contact the lawyer and have them get in touch with you. You can confer with him and let the Court know what your desire is, . . . You may represent yourself. Bond may be continued and I'll just proceed on that basis."
>
> (10/29/87 Hearing, pp. 11-12.)

After the hearing on October 29th, the Court appointed attorney Diane M. Smith to represent Defendant. Defendant accepted her representation and at no time subsequently did he assert that he wished to represent himself.

To the contrary, at the post sentence hearing on August 26, 1988, when Defendant sought to withdraw his plea (with the assistance of appellate attorney Susan J. Smith) because he was dissatisfied with the sentence imposed, Defendant testified as follows concerning attorney Diane M. Smith:

"Q (by Mr. Salan): Were you dissatisfied with Miss Smith's representation?

A (by Defendant): Excuse me?

Q Were you dissatisfied with Miss Smith?

A There are two Miss Smiths in the courtroom.

Q The previous one, the one the subject of this hearing.

A No, I was not.

Q As a matter of fact, it is your opinion she represented you well?

A Yes, I believe she did.

Q She didn't mislead you or anything else?

A I don't think it was ever her intention to mislead me in anything.

Q She advised you truthfully and accurately as you went through this case what it was about?

A Yes.

Q The end result, you are dissatisfied with the sentence you got?

A That's not correct. I'm –

Q Yes or no? Are you dissatisfied with the sentence?

A Yes, I'm dissatisfied but –

Q And that is the purpose why we are here, to review that?

A To reverse my plea.

Q Because of the sentence?

A Yes."

(August 26, 1988 hearing, p. 24)

To paraphrase the Supreme Court in *People v. Reed*, Defendant McNeil was afforded and full and fair opportunity for a reliable determination of his guilt. The testimony in the record, including the preliminary examination testimony and Defendant's own testimony at his plea, clearly and convincingly establishes that he is guilty of the two offenses of kidnapping and extortion.

After his plea-based conviction, Defendant McNeil was afforded an appeal of right, assisted by constitutionally adequate counsel at public expense. No claim of denial of self representation was made on appeal. No good cause has been shown for this failure, and no prejudice has resulted.

Defendant's claims that his plea was defective because he was not advised of his right to self representation and because he was not advised of his right to personally confront and question his accusers are both utterly without merit. Appellant counsel was not ineffective for failing to raise these spurious arguments.

Now, some seven years after conviction, all institutional and public interests support the conclusion that proceedings concerning Defendant McNeil should come to an end. Defendant's motion is denied.

IT IS SO ORDERED.

Dated: 10-25-95

/s/ Charles W. Johnson
Charles W. Johnson (P28926)

c: Ms. Mary Beth Kur
Mr. Kent A. McNeil

APPENDIX B

Court of Appeals, State of Michigan

ORDER

People v Kent A McNeil	Joel P. Hoekstra
Docket #190334	Presiding Judge
L.C. #86 004214 FC	David H. Sawyer William B. Murphy
_____	Judges

The Court orders that the application for leave to appeal is DENIED because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

[SEAL] A true copy entered and certified by Ella Williams, Chief Clerk, on

JULY 12, 1996 /s/ Ella Williams
Date Chief Clerk
[SEAL]

APPENDIX C

Order
Entered: April 25, 1997

106939

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENT ARLAND McNEIL,

Defendant-Appellant.

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Elizabeth A. Weaver
Marilyn Kelly
Justices

SC: 106939
COA:190334
LC: 86-004214-FC

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

20422

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

April 25, 1997 /s/ Corbin R. Davis
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENT McNEIL,

Petitioner,

v.

HENRY GRAYSON,

Respondent.

_____/

Hon. David W. McKeague

Case No.
1:97 CV 461

(Filed
Sept. 21, 1998)

ORDER DENYING CERTIFICATE OF APPEALABILITY

This matter comes before the Court pursuant to the Petitioner's appeal of the denial of his writ of habeas corpus. (Dkt. #42). By an order dated June 9, 1998, this Court adopted the Report and Recommendation of Magistrate Judge Doyle A. Rowland recommending that McNeil's petition for writ of habeas corpus be dismissed because procedural default prevented review of the Petitioner's claims.

Under the amended provisions of the Habeas Corpus Act, a petitioner may not appeal in a habeas case unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). Amended Rule 22 of the Federal Rules of Appellate Procedure extends to district judges the authority to issue a certificate of appealability as well. Fed. R. App. P. 22(b). A certificate of appealability may be issued "only if the applicant has made a substantial

showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Applying this standard, the Court concludes that petitioner is not entitled to issuance of a certificate. This Court can discern no good-faith ground for appeal. Magistrate Judge Rowland's Report and Recommendation was well reasoned, and consistent with the applicable legal standards. In its Order approving the Report and Recommendation, this Court agreed that procedural default prevented the federal courts from reviewing his habeas petition. McNeil has not made a showing, substantial or otherwise, that he has been denied a constitutional right. Consequently, any appeal would be frivolous. Therefore, IT IS ORDERED that the Petitioner is DENIED a certificate of appealability.

DATED: September 21, 1998

/s/ David W. McKeague
HON. DAVID W. McKEAGUE
United States District Judge

APPENDIX E

No. 98-1712

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENT A. MCNEIL, Petitioner-Appellant,	)	
v.	)	ORDER
HENRY GRAYSON, Warden, Respondent-Appellee.	)	

(Filed Dec. 1, 1998)

Before: MARTIN, Chief Judge.

Kent A. McNeil, a Michigan prisoner proceeding pro se, appeals a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The filing of the notice of appeal has been construed as an application for a certificate of appealability. Fed. R. App. P. 22(b).

Upon review, the court denies the application for a certificate of appealability as to all issues.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX F

WEST'S MICHIGAN RULES OF COURT
MICHIGAN COURT RULES OF 1985
CHAPTER 6. CRIMINAL PROCEDURE
SUBCHAPTER 6.500 POST APPEAL RELIEF

Current with amendments received through 2-1-98.

RULE 6.502 MOTION FOR RELIEF FROM JUDGMENT

(A) Nature of Motion. The request for relief under this subchapter must be in the form of a motion to set aside or modify the judgment. The motion must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge.

(B) Limitations on Motion. A motion may seek relief from one judgment only. If the defendant desires to challenge the validity of additional judgments, the defendant must do so by separate motions. For the purpose of this rule, multiple convictions resulting from a single trial or plea proceeding shall be treated as a single judgment.

(C) Form of Motion. The motion must be typed or legibly handwritten and include a verification by the defendant or defendant's lawyer in accordance with MCR 2.114. The motion must be substantially in the form approved by the State Court Administrator, and must include:

(1) The name of the defendant;

(2) The name of the court in which the defendant was convicted and the file number of the defendant's case;

(3) The place where the defendant is confined, or, if not confined, the defendant's current address;

(4) The offenses for which the defendant was convicted and sentenced;

(5) The date on which the defendant was sentenced;

(6) Whether the defendant was convicted by a jury, by a judge without jury, or on a plea of guilty, guilty but mentally ill, or nolo contendere;

(7) The sentence imposed (probation, fine, and/or imprisonment), the length of the sentence imposed, and whether the defendant is now serving that sentence;

(8) The name of the judge who presided at trial and imposed sentence;

(9) The court, title, and file number of any proceeding (including appeals and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed;

(10) The name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;

*888 (11) The relief requested;

(12) The grounds for the relief requested;

(13) The facts supporting each ground, stated in summary form;

(14) Whether any of the grounds for the relief requested were raised before; if so, at what stage of the case, and, if not, the reasons they were not raised;

(15) Whether the defendant requests the appointment of counsel, and, if so, information necessary for the court to determine whether the defendant is entitled to appointment of counsel at public expense.

Upon request, the clerk of each court with trial level jurisdiction over felony cases shall make available blank motion forms without charge to any person desiring to file such a motion.

(D) Return of Insufficient Motion. If a motion does not substantially comply with the requirements of these rules, the court may direct that it be returned to the defendant with a statement of the reasons for its return. The clerk of the court shall retain a copy of the motion.

(E) Attachments to Motion. The defendant may attach to the motion any affidavit, document, evidence, or memorandum of law to support the relief requested.

(F) Amendment and Supplementation of Motion. The court may permit the defendant to amend or supplement the motion at any time.

(G) Successive Motions.

(1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred

after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

[Adopted effective October 1, 1989; amended effective August 1, 1995.]

1989 Staff Comment

The defendant initiates proceedings under Subchapter 6.500 by filing a motion for relief from judgment. The motion is to list all grounds for relief of which defendant has knowledge or with reasonable diligence should have knowledge. The motion is to be limited to a single judgment, although multiple convictions resulting from a single trial or plea proceeding are treated as if they were a single judgment and may be included in the same motion. Subrule (C) spells out the required contents of the motion, which is to be in substantially the form approved by the State Court Administrator. The defendant is permitted to attach affidavits, evidentiary material, or a memorandum of law to the motion. If the motion does not comply with the requirements of the rule, the court may direct that it be returned to the defendant with a statement of the reasons for its rejection.

***889 Staff Comment to 1995 Amendment**

New MCR 6.502(G) limits criminal defendants to filing one motion for relief from judgment with respect to a

conviction, except where the motion is based on a retroactive change in the law or on newly discovered evidence.